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Supreme Court of the United States

OCTOBER TERM, 1955

No. 445

NATIONAL SURETY CORPORATION v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON,
Third Party Defendant.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON,
Intervenor.

BRIEF OF RESPONDENTS, NATIONAL SURETY CORPORATION AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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To the Honorable Supreme Court of the United States:

There are two reasons why the petition for a writ of certiorari herein should be denied:

1. Because this Court has already decided the question in controversy;

2. Because the petitioner has violated Rule 23, subdivision 4, of the Rules of this Court by failing to present the essential facts with accuracy.

I

This Court has already held that, as between themselves, the rights of claimants to a contract balance where an assignment is involved are the same since the enactment of the Assignment of Claims Act of 1940 as they were prior thereto. This Court previously held that, as between themselves, a surety, as subrogee, has rights superior to a bank assignee.

In *McKenzie* v. *Irving Trust Company*, 323 U. S. 365, this Court referred to the Assignment of Claims Act of 1940 in detail, summarized the provisions thereof (p. 367) and said (p. 369):

> "The provisions of the statute governing assignment of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves. Martin v. National Surety Company, 300 U. S. 588."

The citation by this Court of its decision in the *Martin* case is significant. The *Martin* case was decided by this Court in 1937 before the amendment to the Assignment of Claims Act in 1940 permitting assignments to banks. It was held in the *Martin* case that the statute then existing prohibiting the assignment of claims was enacted to avoid the Government "becoming embroiled in conflicting claims" (p. 594). In that case this Court upheld the prior right of a surety against the subsequent assignee. The citation of that decision by this Court applying the holding therein to the Assignment of Claims Act of 1940 establishes beyond further controversy the law that the Assignment of Claims Act of 1940 did not affect the rights of claimants to contract balances as between themselves and that with the exception of the removal of the prohibition against assignment to banks, the law with respect thereto was unchanged.

The *McKenzie* case was decided by this Court on January 8, 1945.

The case of *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company*, 149 Fed. 2d 73, was decided by the Court of Appeals for the Fifth Circuit on April 23, 1945. The case of *General Casualty Company* v. *Second National Bank of Houston*, 178 Fed. 2d 679, was decided by the same Court on December 29, 1949. Both of these cases upon which the petitioner relies to establish a conflict of decision as a ground for the granting of a writ of certiorari in the case at bar were therefore decided after the law as to the effect of the Assignment of Claims Act of 1940 was settled by this Court. It will be noted that in the *Coconut Grove* case, the Court referred to the "primary purpose" of the Assignment of Claims Act of 1940 as being for the benefit of the Government and in order to keep it from being embroiled in controversies between the contractors and their assignees and creditors (p. 77) yet contrary to the law as established by this Court in the *McKenzie* case, the Court nevertheless held that the Act did affect the rights of sureties so as to subordinate them to the rights of assignees.

Undoubtedly, if certiorari had been sought in the Fifth Circuit cases, they would have been reversed as contrary to the decision of this Court and therefore calling for an exercise of this Court's power of supervision. However, that is no ground for a review of the decision in the case at bar which conforms to the law as established by this Court. In other words, the decisions in the Fifth Circuit do not present a true case of conflict of decision upon which certiorari should be granted by this Court.

The Surety Companies Have a Superior Right to the Contract Balance as Against the Bank

Since the decision of this Court in *Prairie State National Bank* v. *United States,* 164 U. S. 227, it has been uniformly held that a surety making payments to laborers and materialmen upon a payment bond given in connection with a Government contract has a prior right to contract balances against the assignees. In the *Prairie State National Bank* case, it was held that the right of an assignee was subordinate to the right of subrogation in the surety.

In *United States* v. *Munsey Trust Company of Washington, D. C.,* 332 U. S. 234, 240, 67 S. Ct. 1599, 1602, decided June 23, 1947, it was said:

> "But the Surety urges that it is subrogated also to the rights of laborers and materialmen whom it paid and/or the United States. From Prairie State National Bank of Chicago v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412, to American Surety Company v. Sampsell, 327 U. S. 269, 66 S. Ct. 571, 90 L. Ed. 663, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available monies ahead of others whose claims come from the advance of money."

Other decisions sustaining the prior right of the surety are as follows:

Hardaway v. *National Surety Company,* 211 U. S. 552;

Henningsen, et al. v. *U. S. F. & G. Co.,* 208 U. S. 404;

Lacey v. *Maryland Casualty Co.,* CCA-4, 32 F. (2d) 48;

Standard Accident Insurance Co. v. *Federal Nat. Bank,* CCA-10, 112 F. (2d) 692;

First Nat. Bank of Seattle v. *City Trust, etc.,* CCA-9, 114 Fed. 529;

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Southern Surety Co. v. *Holden*, CCA-8, 14 F. (2d) 411;
Moran v. *Guardian Casualty Co.*, App. D. C., 76 F. (2d) 439.

And, of course, in addition to the above, there are the cases in the Court of Claims prior to the case at bar decided since the enactment of the Assignment of Claims Act of 1940.

Royal Indemnity Company v. *U. S.*, 117 Ct. Cls. 736, 93 Fed. Supp. 891;
Hardin County Savings Bank v. *U. S.*, 106 Ct. Cls. 577, 65 Fed. Supp. 1017;
Modern Industrial Bank v. *U. S.*, 101 Ct. Cls. 808.

It has likewise been held that the surety's priority extends to all the funds in the hands of the United States and such right is not limited to retained percentages included therein.

Lacey v. *Maryland Casualty Company*, 32 Fed. (2d) 48 (CCA-4);
Standard Accident Insurance Company v. *Federal National Bank*, 112 Fed. (2d) 692 (CCA-10);
Farmers Bank v. *Hayes*, 58 Fed. (2d) 34 (CCA-6);
Alabama-Tennessee Nat. Gas Co. v. *Lehman-Hoge & Scott*, 122 Fed. Supp. 314 (D. C. Ala.).

And such priority is sustained in favor of sureties making payments on payment bonds even though the sureties have not completed the contracts.

Henningsen et al. v. *U. S. F. & G. Co.*, 208 U. S. 404;
Maryland Casualty Co. v. *U. S.*, 100 Ct. Cls. 513, 53 Fed. Supp. 436;
Alabama-Tennessee Nat. Gas. Gas v. *Lehman-Hoge & Scott*, 122 Fed. Supp. 314 (D. C. Ala.);
U. S. v. *Crosland Const. Co.*, 120 Fed. Supp. 792 (D. C. So. Carolina);
Hardaway v. *National Surety Co.*, 211 U. S. 552;
U. S. F. & G. Co. v. *City of Bristow*, 4 F. (2d) 810;
Central State Bank v. *U. S. F. & G. Co.*, 9 F. (2d) 326;
Fidelity & Deposit Co. of Maryland v. *Union State Bank*, 21 F. (2d) 102;
In re Scofield, 215 Fed. 45.

The decision of the Court of Claims in the case at bar follows the decisions of this Court and all the other decisions sustaining the prior right of the surety and was in all respects proper.

Petitioner cites no case other than the *Coconut Grove* case and the *General Casualty* case, both in the Fifth Circuit, which are contrary to the law so uniformly settled and established as to the priority right of the surety. These cases are based upon a misconstruction of the provision in the Assignment of Claims Act of 1940 to the effect that notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Act shall constitute a valid assignment for all purposes. The true intent of such provision was stated in the dissent of Circuit Judge Sibley in the *Coconut Grove* case where he said (p. 80):

> "It is true the Act says: 'Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this paragraph shall con-

stitute a valid assignment for all purposes'; but I think the validity asserted is against all the other laws referred to, and for all purposes for which assignments are usually valid. The primary purpose of the Act was to remove the impediment which the federal statutes had before imposed, and to make it safe and lawful for the United States to pay the assignee without enquiry into the equities of other persons. It was not intended to upset the established doctrines as to the relation of such assignments to the rights of the surety on the contractor's bond, or those of the laborers and materialmen to be paid out of the proceeds of the job."

Similarly, the correct interpretation of such provision of the Act was stated by the Court of Claims in the *Royal Indemnity* case, supra, where it was said:

"The bank contends that the provision in the 1940 Act that, 'Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment for all purposes' has the effect of making the assignment to it by the contractor the *only* allowable claim against the Government, superior to the claims of suppliers, laborers, or surety.

'Notwithstanding any law to the contrary' is a strong phrase and, read out of context, seems to support the above position. The next phrase, however, is 'governing the validity of assignments.' Taken together, as they must be, the statute reads, 'Notwithstanding any law to the contrary governing the validity of assignments an assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment for all purposes.' What was the law in 1940 governing the validity of assignments of claims against the United States? It was the law expressed in Rev. Stat. 3477 and 3737 to the effect that any assignment of an unliquidated claim against the United States should be null and void. The 1940 Act recites its purpose to be 'To assist in the national-defense program by amending sections 3477 and 3737 of the Revised Statutes to permit the assignment of claims under

public contracts.' It was *these* statutory provisions that the Congress referred to in the phrase, 'Notwithstanding any law to the contrary governing the validity of assignments.' The long-established principle that an assignee with notice of a prior equity takes only the interest of the assignor was not legislated away by the 1940 Act. The purpose and effect of the 1940 Act was to make a contract claim against the United States assignable before maturity to some single financial institution for the purpose of securing credit; nothing more. No other view would seem compatible with the wording and history of the Act and with expressions of Members of Congress who enacted it into law.

The intervening bank, which took the legal assignment with knowledge of the surety's prior equity and lent money on the faith thereof stands now in the exact position that would have been occupied by the contractor had there been no assignment and were the contractor himself now before this court."

We have already shown that this Court in *McKenzie* v. *Irving Trust Company,* supra, held that the Assignment of Claims Act of 1940 was not intended to regulate the equities of claimants as between themselves.

The Court of Appeals in the Fifth Circuit has read into the statute not only a provision that assignments under the Act shall be given priority over sureties on contract bonds, but also a provision that the surety is required to prove a wrongful diversion of the funds loaned by the bank and that in the absence of such proof, the bank is entitled to priority in payment of the balances (see *Coconut Grove* case, p. 79). The Judges in the Court of Claims who dissented in the *Royal Indemnity* case and in the case at bar have adopted the construction of the Act applied by the Courts in the Fifth Circuit.

There is no basis for reading into the statute provisions as to order of priority or requirements as to proof. If it were intended that the subrogation rights of sureties should

be subordinate to the claims of assignees or that a surety should be required to prove diversion of the funds loaned by banks to contractors, the same should be clearly expressed in the statute.

So in *Hardin County Savings Bank* v. *United States*, supra, it was said:

> "We have examined the history of the Act and find nothing in it which shows that by this provision Congress intended anything more than that an assignee should 'stand in the shoes' of the assignor, and that an assignment made in conformity with the Act should not be declared invalid because of the provisions of R.S. sections 3477 and 3737, 31 USCA section 203; 41 USCA section 15. An assignment by a contractor may be valid for all purposes but inoperative to extinguish the contractual rights of the Government and those of the surety on the contractor's bond. It cannot, therefore, be said that Congress intended to overturn the rule of law announced and applied in the decided cases and give an assignee greater rights than he would have had if sections 3477 and 3737 R.S. had not been enacted. It had been established before the Assignment of Claims Act of 1940 was enacted that a contractor could not by an assignment of amounts due under his contract convey any greater rights with respect thereto than he possessed under his contract and that an assignee making advances on the faith of such assignment assumed the risk incident to the failure of such contractor to fulfill his contractual obligations; it would, therefore, require clear and specific language to justify the conclusion that Congress intended by the Act of 1940 to legislate to the contrary."

The bank which makes a loan secured by an assignment of a contract balance does so with full knowledge of the rights of sureties on the bonds executed by them and as stated in *Prairie State National Bank*, supra, is a mere volunteer. The surety, however, has no control over assignments given by the contractor. The Assignment of Claims Act does not authorize sureties to approve or dis-

approve such assignments and the consent of the surety is not necessary to the validity thereof.

The effect of the decisions in the Fifth Circuit is to enable a contractor, after he has obtained a bond, to assign all the funds due to him from the Government and leave the sureties without the protection which they have uniformly been held to have in the unpaid contract balances for payments required to be made by them on performance and payment bonds, without which no contract would be awarded in the first instance.

II

Petitioner has violated Rule 23, subdivision 4, of the Rules of this Court in failing to present essential facts with accuracy.

A.

It is stated in the petition (p. 5) that subsequent to the default of the contractor in the completion of the contracts, the surety companies abandoned said contracts and that they were completed by the United States of America. It is further stated in the petition (p. 10) that the surety companies permitted the United States Government to arrange for completion of the work out of retained percentages and other amounts to become due on completion of the contracts. These statements are inaccurate.

In the *National Surety* case it was stipulated by all parties and the Court of Claims found that the Government accepted the contract as completed (R. 54, Finding 5 in Decision of Court of Claims). There was no abandonment by the National Surety Corporation of the contract or completion by the United States as stated in the petition nor were there any completion costs assessed by the Government against the contractor in arriving at the balance due on the contract.

In the *Fidelity and Deposit* case, it is true that the contractor defaulted and the Government relet the work for completion and assessed the completion costs against the balance due on the contract and it was so stipulated by all the parties and the Court so found (Opinion p. 39, Finding 29). However, there was no abandonment of the contract by the surety company, but the surety advised the Government that it elected not to proceed with completion, whereupon, in accordance with usual practice, the Government completed and charged the costs thereof against the balance due on the contract.

B.

It is stated in the petition that the assignment to the First National Bank in Houston under the Assignment of Claims Act was given to secure repayment of funds loaned to the contractor (Petition, p. 6).

The petitioner fails to state that at the time such assignment was executed, no loan was made to the contractor. It was so stipulated and the Court of Claims so found (R. 64, 115; Findings of Court of Claims 19 and 43).

C.

It is stated in the petition that the record is clear that the funds loaned by the bank to the contractor were made to assist and enable it to carry on and perform its contracts with the defendant (Petition, p. 7). Petitioner makes no reference to the record to support such statement. All the facts were stipulated in the Court below. There is no stipulation whatever that the funds were used to perform the contracts. The parties stipulated as to the loans made to the contractor (R. 61 and 110) but there was no stipulation or evidence in the record as to the use of the funds.

Indeed, the Court of Claims referred to the absence of any evidence to show the use of the funds and said (Opinion, pp. 20-21):

> "Furthermore, it does not affirmatively appear in this case whether or not the money borrowed from the bank was used in the performance of these contracts, and, if so, which of the two. The purpose of the 1940 amendment to the Assignment of Claims Act (41 U. S. C. 15; 61 Stat. 501; 65 Stat. 41) was to enable a contractor to obtain money to finance his contracts with the United States. If the money borrowed was not used in the performance of the contract, the lender is not equitably entitled to the benefit of the assignment."

D.

The Question Presented for Review Is Inaccurately Stated in the Petition

The petition states that the question presented for review is whether the claims of sureties based upon assignment provisions in the contractor's applications for bonds are prior and superior to the claim of the bank resting upon assignment to it under the Assignment of Claims Act (Petition, p. 3). In the amplification of reasons relied on for the allowance of the writ, the petitioner again refers to the assignment to the bank as the only legal and valid assignment in the case and states that the surety companies do not have a valid, legal assignment of the unpaid balances of the contracts (Petition, p. 7).

Throughout this case, the petitioner has ignored the claims of the surety companies based upon rights of subrogation and not upon any assignment. The decision in the Court below did not rest upon any assignment to the surety companies contained in applications for the bonds, but recovery was allowed to the sureties solely upon their subrogation rights. There is not a single reference in the opinion of the Court below to any assignment by the con-

tractor to the sureties. The decision rested squarely upon the surety's rights arising by subrogation. The Court, referring to the rights of laborers and materialmen to which the sureties became subrogated said:

> "They claim subrogation to their rights against the contractor and to the rights of the United States on the bonds" (Opinion, p. 16).
>
> "In each case we have decided that the equity of the surety company was superior to the rights acquired by the bank under a valid legal assignment * * *" (Opinion, p. 16).
>
> "We reiterate our former opinion that the equity of the surety company is superior to the rights of the bank acquired under an assignment, whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond * * *" (Opinion, pp. 16-17).
>
> "When the surety pays the laborers and materialmen, it becomes subrogated to their right to assert an equitable claim to the moneys in the hands of the defendant * * *" (Opinion, p. 19).
>
> "Looked at from another light, the surety's rights are superior to the rights of the bank: It is settled that the surety's rights arising by subrogation or substitution relate back to the date of the execution of the surety bonds" (Opinion, p. 20).

The question decided by the Court of Claims was therefore not whether the assignments contained in the contractor's application for the bonds were superior to the assignment to the bank, but whether the surety's subrogation rights were superior to the assignment to the bank.

It is true that when the bonds were originally obtained, the contractor assigned the monies to become due to the sureties, effective on default, but the Court of Claims rested its decision on the right of subrogation.

E.

The Decision of the Court of Claims Is Not in Conflict With the Decisions of This Court

It is stated in the petition (p. 2) that the opinion of the majority of the Court of Claims is in direct conflict with the opinions of this Court in *Central Bank* v. *United States*, 345 U. S. 639, 646, and *Martin* v. *National Surety Company*, 300 U. S. 588.

There is no conflict whatever between the decision of the Court of Claims and the foregoing decisions of this Court.

In *Central Bank* v. *United States*, supra, there was an action by a bank to recover an unpaid balance on a contract in which the Government claimed an offset for taxes due from the contractor. This Court refused to permit the set-off under the provisions of the Assignment of Claims Act expressly providing that there should be no set-off for any indebtedness of the contractor arising independently of the contract.

No surety on the bond of the contractor was involved in that case nor was there any intimation or reference to the surety's rights of subrogation.

The only basis for the petitioner's conclusion that the decision of the Court of Claims herein was in "direct conflict" with the decision of this Court in the *Central Bank* case, is the statement of this Court that the Assignment of Claims Act should be construed so as to carry out the purpose of Congress to encourage private financing of Government contracts (Petition, p. 7). The Court of Claims made no statement to the contrary nor did it pass on the same question involved in the *Central Bank* case. All that the Court of Claims held was that the Assignment of Claims Act was intended to do nothing more than to remove the prohibition against the assignment of a claim against the United States in the case of a financial institu-

tion lending money to a contractor and that under such an assignment, a bank, insofar as prior obligations were concerned, received no more than it would have gotten if the Act had not been passed (Opinion, p. 6). Obviously, there is no conflict whatever between the decision of the Court of Claims and the decision of this Court in the *Central Bank* case.

It is stated in the petition that the decision of the Court of Claims is also in conflict with the opinion of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588. In that case, this Court upheld the rights of a surety on a payment bond against the claims of a subsequent assignee to a contract balance. The decision of the Court of Claims herein was therefore not in "direct conflict" with the decision of this Court, but, on the contrary, was in conformance therewith. This Court, in the *Martin* case, upheld the surety against the bank under the statute as it existed before the 1940 amendment. There is not a single suggestion in the petition herein to show how the decision of the Court of Claims conflicts with the *Martin* decision. There was a reference to the *Martin* decision in the quotation in the petition (p. 11) from the case of *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company*, 149 Fed. (2d) 143, wherein the Circuit Court of Appeals for the Fifth Circuit referred to the Act prior to the 1940 amendment as having been construed by this Court in the *Martin* decision as having for its primary purpose the protection of the Government. The petition is utterly devoid of any statement of fact or argument in support of the reason given by the petitioner for the allowance of certiorari that the decision of the Court of Claims is in "direct conflict" with the decision of this Court in the *Martin* case. The recklessness of the statements contained in the petition becomes striking when it is noted that the Court of Claims in the case at bar relied on the *Martin* decision of this Court as one of the authorities for upholding the equitable priority of the sureties against the claim of the bank (Opinion, p. 19).

F.

The Decision of the Court of Claims Was Not Contrary to the Holding in *United States* v. *Hadden*, 192 Fed. 2d 327, Nor Inconsistent With Its Former Opinions

It is stated in the petition (p. 2) that the opinion of the majority of the Court of Claims is contrary to the view expressed by the United States Court of Appeals for the Sixth Circuit in *United States* v. *Hadden*, 192 Fed. (2d) 327. In that case, suit was brought by the United States to recover a payment erroneously made to the contractor. The contractor had assigned the proceeds to a factoring corporation to whom payment was made by the contractor. The Court there held that in the absence of a provision in the Assignment of Claims Act reserving the right to the Government to recover erroneous payments from assignees, no such right existed and the matter was governed by the general law of restitution. Clearly, there is no conflict with the *Hadden* decision even though it was said in that case that the purpose of the Act was to make it easier for Government contractors to secure financing for Government contracts.

The holding in the *Hadden* case that in the absence of provision to the contrary, the general law as to restitution would govern is in conformity with the holding in *Hardin County Savings Bank* v. *United States*, 65 Fed. Supp. 1017, which was one of the cases relied on by the Court of Claims in our case (Opinion, p. 16) wherein it was said that it would require clear and specific language in the statute to justify the conclusion that Congress intended by the Act of 1940 to give an assignee greater rights than he would have had if the statute had not been enacted.

Moreover, there were no rights of sureties involved in the *Hadden* case, and the question at issue before the Court was entirely different from the case at bar. Hence, there can be no conflict in the decision in our case with the *Hadden* case. It is also to be noted that there is not a single word

of fact or argument in the petition attempting to support the conclusion that there is such a conflict other than the reference to the statement in both cases that the Assignment of Claims Act was enacted to enable contractors to finance their Government contracts.

It is further stated in the petition (p. 2) that the decision of the Court of Claims herein is inconsistent with its own opinions in *Waxman* v. *United States*, 112 Fed. Supp. 570, and *Central National Bank of Richmond* v. *United States*, 91 Fed. Supp. 738.

The only similarity in those decisions to the case at bar is that in both cases, the Court of Claims held that the Act was passed to enable Government contractors to secure financing for their Government contracts. There is no other similarity of fact or issue involved in those cases.

In *Waxman* v. *United States*, supra, an action was brought by a contractor under the Lucas Act for losses sustained in the performance of a Government contract. The Court held that an assignee under the Assignment of Claims Act was a proper party to such suit. The rights of sureties were not involved.

In the *Central National Bank* case, supra, the assignee sued to recover a balance on contract which the Government had mistakenly paid to the contractor notwithstanding the assignment. It was held that the effect of the Act is to place the Government in the same position as that of any ordinary debtor, that the payment to the contractor contrary to the assignment was at the Government's peril and that the assignee was entitled to recover from the Government. The Court further said (p. 740):

> "When a question regarding assignments as they affect the Government arises, the general law of assignments must govern."

It will be noted from the above holding that it conforms to the decision of the Court of Claims in the case at bar to

the effect that the Assignment of Claims Act did not change the rights of assignees; that the bank, insofar as prior obligations were concerned, received no more than it would have gotten had the statute not been enacted (Opinion, p. 21).

CONCLUSION

Petitioner has failed to comply with Rule 23 of the Rules of this Court, in that it has failed to present a correct statement of the facts in the record; failed to present the proper question for review; and made erroneous statements as to alleged conflict of the decision in the case at bar with decisions of this Court and other courts and of an alleged inconsistency in the decision in the case at bar with prior decisions of the Court of Claims. This Court has held that in such circumstances, without more, a petition for certiorari will be denied.

The petition should also be denied on the ground that there is no true conflict of decision upon which review on certiorari should be granted since this Court has already established the law of the case with respect to the effect of the Assignment of Claims Act of 1940 on the rights of claimants to contract balances as between themselves.

The petition should also be denied on the ground that the decision of the Court of Claims in the case at bar was in all respects correct and proper.

Respondents, National Surety Corporation and Fidelity and Deposit Company of Maryland therefore submit that the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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